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ONE HUNDRED ELEVENTH CONGRESS

Congress of the United States

House of Representatives

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December 1, 2010

The Honorable Julius Genachowski
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Chairman Genachowski:

We understand that you intend to follow our recommendation and abandon proposals to reclassify broadband as an old-fashioned telephone service under Title II of the Communications Act. We congratulate you on that wise decision. As we have stated previously, treating the Internet as if it were common carriage is a mistake.

We also understand, however, that you still are considering adopting network-neutrality rules by invoking ancillary authority under Title I of the Act. There are questions as to the FCC's statutory authority to adopt these rules under Title I. The D.C. Circuit ruled in its April 2010 *Comcast* decision that the FCC had failed to demonstrate authority under Title I to regulate Internet network management.

We therefore write to request your analysis of the FCC's authority under Title I to issue the proposed rule. In the absence of clear authority, the FCC should defer to Congress in this matter.

WCB
Network Abolished
1827

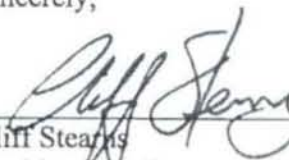
Letter to the Honorable Julius Genachowski
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Please provide a written response to this letter by December 10, 2010. If you have any questions, please contact our Committee staff at (202) 225-3641.

Sincerely,



Joe Barton
Ranking Member



Cliff Stearns
Ranking Member
Subcommittee on Communications,
Technology, and the Internet

cc: The Honorable Henry A. Waxman, Chairman

The Honorable Rick Boucher, Chairman
Subcommittee on Communications, Technology, and the Internet

Commissioner Michael J. Copps
Commissioner Robert M. McDowell
Commissioner Mignon Clyburn
Commissioner Meredith Attwell Baker



FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

December 10, 2010

OFFICE OF
THE CHAIRMAN

The Honorable Joe Barton
Ranking Member
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Barton:

Thank you for your most recent letter regarding the Commission's authority to adopt rules to preserve the openness of the Internet. As you note, the Commission has announced a tentative agenda for its open meeting on December 21, 2010, which includes a proposed Order adopting rules of the road to preserve the Internet freedom and openness. High-level rules to preserve Internet freedom and openness will, I believe, foster innovation and investment in Internet networks and in the content, applications, and services that use those networks, as well as promote consumer choice and encourage consumers to subscribe to broadband – all in furtherance of stated goals for the Commission in congressional statutes.

I appreciate your perspective about whether the Commission possesses sufficient authority to proceed with this action. I am satisfied that the Commission has a sound legal basis for adopting these rules, grounded in its authority under the Communications Act of 1934 (the Act) and the Telecommunications Act of 1996 (the 1996 Act). In the following pages, I enclose a summary prepared by the Commission's General Counsel of the statutory authority currently available to the Commission.

I appreciate this opportunity to continue a dialog with you on this important matter. Please let me know if I can be of any further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Julius Genachowski", is written over the typed name. The signature is stylized with a large, sweeping "J" and "G".

Julius Genachowski

Enclosure



FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

December 10, 2010

OFFICE OF
THE CHAIRMAN

The Honorable Cliff Stearns
Ranking Member
Subcommittee on Communications, Technology,
and the Internet
Committee on Energy and Commerce
U.S. House of Representatives
2370 Rayburn House Office Building
Washington, D.C. 20515

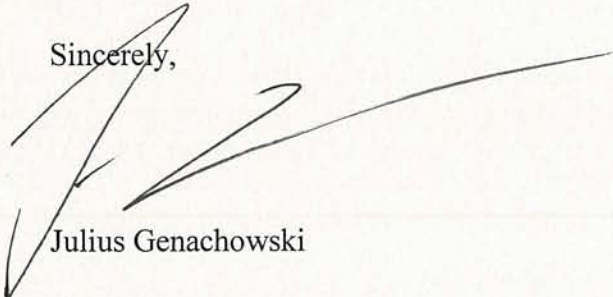
Dear Congressman Stearns:

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Sincerely,



Julius Genachowski

Enclosure

**Federal Communications Commission
Office of the General Counsel**

Section 706(a) of the 1996 Act directs the Commission to “encourage the deployment on a reasonable and timely basis” of “advanced telecommunications capability” (which includes broadband Internet access) to all Americans.¹ That broad mandate, the United States Court of Appeals for the District of Columbia Circuit recently explained, confers on the Commission the “authority and discretion to settle on the best regulatory or deregulatory approach to broadband.”² In the *Comcast/BitTorrent* case, the D.C. Circuit regarded the Commission as “bound by” one of its prior *Orders* that, in the court’s understanding, had held that Section 706(a) is not a grant of authority.³

The Commission’s prior *Order* appears to be consistent with a reading of Section 706(a) that authorizes the Commission to adopt open Internet rules. In any event, nothing in the *Comcast* opinion precludes the Commission from adopting a new interpretation of Section 706(a) so long as the Commission adequately explains its basis for doing so.⁴ Furthermore, Section 706(b) of the 1996 Act directs the Commission, if it finds that broadband has not been adequately deployed to all Americans, to “take immediate action” to “accelerate deployment” of broadband by “removing barriers to infrastructure investment” and “promoting competition in the telecommunications market.”⁵ The Commission made such a determination in July 2010.⁶

The Commission also has authority to adopt open Internet rules to protect and promote competition and investment in voice, video, and audio services. For instance, it has authority under the Act to protect over-the-top Internet voice (VoIP) services as a competitive constraint on traditional telephone services, and to protect interconnection between VoIP and traditional telephone providers. The Commission’s authority further derives from its statutory responsibility to ensure the “orderly development . . . of local television broadcasting”⁷ and the “more effective use of radio.”⁸ Practices of broadband providers that block, degrade, or otherwise disadvantage Internet traffic jeopardize television and radio broadcasters’ ability to offer their

¹ 47 U.S.C. § 1302(a).

² *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 906-07 (D.C. Cir. 2009).

³ *Comcast Corp. v. FCC*, 600 F.3d 642, 658-59 (D.C. Cir. 2010); see *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Mem. Op. & Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012 (1998).

⁴ See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) (quoted in *Comcast*, 600 F.3d at 659).

⁵ 47 U.S.C. § 1302(b).

⁶ See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Sixth Broadband Deployment Report, GN Docket No. 09-137, paras. 2-3 (rel. July 20, 2010).

⁷ *United States v. Sw. Cable*, 392 U.S. 157, 177 (1968).

⁸ *Nat’l Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943) (citation omitted).

programming over the Internet and, in turn, threaten their ability to offer high-quality broadcast content. Open Internet rules are likewise necessary to address similar practices, prohibited under Title VI of the Act, that harm competition in the subscription video market.⁹ Finally, open Internet rules for fixed and mobile wireless services are supported by the Commission's authority, under Title III of the Act, to protect the public interest through spectrum licensing.¹⁰

⁹ *See* 47 U.S.C. §§ 548(b), 536(a).

¹⁰ *See, e.g.*, 47 U.S.C. §§ 309(a) and (j)(3), 316(a)(1).